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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LUIS CASTILLO,

Plaintiff and Appellant,

v.

BEVERLY BOOKS, INC.,

Defendant and Respondent.

B214945

(Los Angeles County
Super. Ct. No. BS116056)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Kenneth R. Freeman, Judge. Affirmed.

George Hakim for Plaintiff and Appellant.

Law Offices of Clyde DeWitt, Clyde F. DeWitt for Defendant and Respondent.

This case involves a claim by an hourly employee, plaintiff Luis Castillo, for unpaid wages for the rest breaks and meal periods he was denied by his employer, defendant Beverly Books, Inc. Castillo successfully litigated his claim before the State Labor Commissioner, but Beverly Books filed an appeal to the Los Angeles Superior Court (Lab. Code, § 98.2).¹ After a trial de novo, the superior court denied his claim and entered judgment in favor of Beverly Books. We affirm because, unlike his claim before the Labor Commissioner, at the trial de novo Castillo failed to present evidence of damages with specific dates and total hours alleged to be unpaid, rendering any award of damages speculative.

FACTUAL AND PROCEDURAL SUMMARY

Castillo was employed for approximately 19 years as a clerk and cashier at an adult book and video store known as “X Spot,” which was owned by Beverly Books. In September of 2007, Castillo was accused of stealing from the store and was fired. Thereafter, Castillo filed a claim with the Labor Commissioner against his former employer. Castillo alleged that Beverly Books failed to pay him payroll wages from January 1, 2007, through September 13, 2007, and also owed him wages for rest breaks and meal periods he was denied. The Labor Commissioner awarded Castillo approximately \$29,000 on his claims, including interest and penalties. The written decision rendered by the hearing officer noted, in pertinent part, that Castillo had testified that Beverly Books failed to provide him with 756 meal periods and 756 rest periods from October 17, 2004, to September 9, 2009, with a different number of violations specified during each year and at different rates of compensation specified for each year.

Beverly Books appealed, exercising its statutory right to a trial de novo in the superior court. As indicated by Castillo’s brief before the trial court, he asserted claims for unpaid payroll wages (a claim he abandons in the present appeal), for wages for rest

¹ All statutory references are to the Labor Code, unless otherwise indicated.

breaks and meal periods he was denied, and for restitution pursuant to the unfair competition law (Bus. & Prof. Code, § 17200, et seq.).

Castillo worked for many years for Beverly Books as a store clerk. Beverly Books has several 24-hour adult entertainment stores with only one clerk at a time on duty. The sole clerk on duty must remain at the store all the times. However, a store manager or janitor was often at the store with Castillo. Castillo's regional supervisor observed Castillo on the store's video recording monitor taking breaks after several hours by putting his feet up on the cash register or on a display case, and on one occasion Castillo left the store while a customer was present. Nonetheless, Beverly Books did not allow Castillo to be relieved of his duties while at the store, and Castillo was not authorized by his employer to take statutorily mandated rest breaks or meal periods away from the store.

The position of Beverly Books was that the time periods when no customers happened to be in the store counted as rest breaks. Regarding the absence of formal meal periods, the store's theory was that as long as the store clerk could eat his meal behind the counter while still getting his hourly pay, such time should be deemed a proper meal period. The trial court disagreed with such notions and found that under California law an employee must be completely relieved of his duties during breaks and meal periods.

Castillo also claimed at trial (though not now on appeal) that he received "no wages" from January 5, 2007, through September 9, 2007, the date he was fired. During that nine-month period Castillo never complained in writing to his employer about not getting a paycheck. Castillo's payroll checks during that period were issued in his name and were cashed at a check cashing store near the bookstore. However, those checks were not endorsed by him. Two employees of Beverly Books explained what occurred: a janitorial employee cashed the checks for Castillo, and then with Castillo's knowledge he gave the money to other bookstore employees who worked some of Castillo's shifts for him for less money than Castillo had been paid.

At the conclusion of the trial, the court found as follows: "[W]ith respect to Mr. Castillo's testimony, I find him to be thoroughly unbelievable and deceptive. I think he's

intentionally false in his testimony. And for that reason . . . I find that based on his testimony he has not established that he was not paid. [¶] I believe, I find specifically that he was paid. I think that it is beyond imagination that a person could work for the number of weeks and months that Mr. Castillo says he worked and not be paid and not demand, in writing, his pay. It makes no sense whatsoever. [¶] What I do believe is, I believe the other witnesses that have stated that what happened was Mr. Castillo made arrangements with [the bookstore janitor] to . . . cash the checks and give the cash—that somehow the cash was returned to Mr. Castillo; and he hired at least two other employees to take his place during his shift and he paid them, at least one employee, \$50.00 for the eight-hour shift. [¶] Mr. Castillo, therefore, was defrauding his company by doing this. That is, he was being paid his salary. He was taking his salary and he was paying a fraction of it to someone else, without giving that person any of the benefits of an employee, and he himself was deriving, was getting those very benefits. [¶] And so he was defrauding [Beverly Books] in this case and defrauding the people who worked for him. And violating the Labor Code himself by subcontracting with other people to take his place for less than the minimum wage.”

The court then concluded by finding as follows: “However, I do find also that Beverly Books does not comply with the law with regard to the giving of meal breaks and rest breaks. But because I cannot find that Mr. Castillo worked for Beverly Books for any period of time, and because I find specifically that he defrauded his employer, I find that it would be . . . extremely unjust to allow someone who defrauds the Labor Code system, the statutory scheme [involving] his employer to protect employees, to then attempt to use that statutory scheme to derive benefits. [¶] And so while Beverly Books is, I believe, violating the law in the way that they are treating rest and meal breaks, and I suggest that that change, my ruling, of course, is only for this case. So you have my specific finding that Beverly Books does not provide meal and rest breaks; but you also have my specific finding that Mr. Castillo defrauded Beverly Books and misused and illegally entered into employment agreements with third parties to do his job at a profit to him and at the expense of those people and so, therefore, judgment for the defense.”

Castillo appeals following entry of judgment in favor of Beverly Books.²

DISCUSSION

Castillo contends that he is entitled to the unpaid earned wages for missed rest breaks and meal periods because the trial court specifically found that his employer violated statutory provisions requiring rest and meal periods. (See, e.g., §§ 200, subd. (a), 226.7, subds. (a) & (b), 512, subd. (a).)³ Castillo contends that wages for missed rest breaks and meal periods were due to him, the wages should have been paid immediately and unconditionally, and such wages could not have been deducted or withheld even for alleged misconduct. Castillo further urges that evidence of his “unclean hands” cannot be used as an estoppel defense to his claim, because that equitable defense is purportedly limited in employment cases only to claims of wrongful discharge or employment discrimination. Castillo also argues that equitable estoppel is a factual issue that should have been raised at trial and cannot be belatedly argued now on appeal.

However, even assuming Castillo’s underlying claim is meritorious and his complaints about the use of the unclean hands doctrine (which the trial court focused on, though not labeling it as such) are well taken, we conclude that Castillo still cannot prevail. Castillo’s case suffers from a lack of proof. His case is fatally flawed by the lack of evidence of the specific total amount of damages, rendering any award of damages speculative and improper. The trial court simply had no evidence before it from which it could calculate exactly how many rest breaks and meal periods Castillo missed.

² Contrary to the assertion by Beverly Books, the notice of appeal was timely filed and not fatally premature. On February 11, 2009, the court announced its final ruling. On March 24, 2009, the judgment was filed. However, the notice of entry of judgment was filed on March 3, 2009, rendering the notice of appeal filed on March 19, 2009, timely and not premature. (Cal. Rules of Court, rule 8.104(a) & (e).)

³ We note that the proper interpretation of statutory provisions governing an employer’s duty to provide rest breaks and meal periods is pending before the California Supreme Court. (*Brinker Restaurant v. Superior Court*, review granted Oct. 22, 2008, S166350.)

An employer-employee situation, even employment at-will, is “fundamentally contractual” (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 696), and thus is governed by the rules applicable to contract damages. It is well settled that, “No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.” (Civ. Code, § 3301; see *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 695-696.)

The rule that damages must be certain and not speculative or conjectural is essentially a requirement involving the sufficiency of the plaintiff’s evidence. As observed in *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 531, a plaintiff must ““produce evidence which supports a logical inference in his favor and which does more than merely permit speculation or conjecture.””

In the present case, the precise amount of damages claimed was apparently capable of exact calculation. Indeed, as indicated by the written decision of the Labor Commissioner, Castillo presented to the hearing officer evidence of the exact number of rest breaks and meal period violations from October 17, 2004, to September 9, 2007, with four different hourly rates during four different time periods. In contrast to the situation before the hearing officer, however, at the trial de novo in the superior court Castillo presented no specific evidence of the exact number of violations and of the compensation allegedly due.

“Although denoted an ‘appeal,’ unlike a conventional appeal in a civil action, [an appeal from such a] hearing under the Labor Code is de novo. [Citation.] “A hearing *de novo* [under Labor Code section 98.2] literally means a new hearing,” that is, a new trial.’ [Citation.] The decision of the commissioner is ‘entitled to no weight whatsoever, and the proceedings are truly “a trial anew in the fullest sense.”’ [Citation.] The decision of the trial court, after de novo hearing, is subject to a conventional appeal to an appropriate appellate court [as here]. [Citation.] Review is of the facts presented to the trial court, which may include entirely new evidence.” (*Post v. Palo/Haklar & Associates* (2000) 23 Cal.4th 942, 947-948; see also *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1116.)

Thus, the specific number of rest breaks and meal period violations and the damages calculated at the hearing stage on the complaint before the Labor Commissioner are of no consequence to the subsequent trial de novo. Evidence of specific violations and damages must be established anew at the trial de novo.⁴ Castillo failed to do so.

Additionally, Castillo essentially subcontracted some of his work hours to other persons (at a lower rate of pay than he earned), further frustrating a proper calculation of damages. Castillo's subcontracting scheme made it impossible to determine exactly how many rest breaks and meal periods he was deprived of, because the exact number and dates of all the subcontracted hours were never established at trial. Although Castillo properly notes that employees were permitted to trade shifts, thus working the same total number of hours, there was no evidence that employees were permitted to not work the number of hours assigned and merely subcontract their work to others—which is what Castillo did to some unknown extent.

Finally, Castillo devotes considerable effort to counter the trial court's observation at the conclusion of the trial that it could not find that Castillo actually "worked for Beverly Books for any period of time." Even disregarding Castillo's testimony, it is apparent that substantial testimonial and documentary evidence indeed established that Castillo worked for Beverly Books to some extent. It is also apparent, viewing the comment in its proper context, that what the trial court meant when it remarked that it could not "find that Castillo worked for Beverly Books for any period of time," was that it could not determine from the evidence all the specific periods of time Castillo actually worked there.

⁴ We note that Beverly Books proposed stipulating to a number of facts, including that Castillo was employed as a cashier by Beverly Books from October 10, 1989, to September 9, 2007, and that he "worked an eight (8) hour shift, usually from 3:00 p.m. to 11 p.m., five days per week, for a total of forty (40) hours a week." However, ultimately the parties did not stipulate to any facts, and the trial court properly considered only the testimony given and the exhibits admitted at trial.

Castillo's contentions are unavailing, and the judgment in favor of Beverly Books must be affirmed.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.